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No. 01-1135

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS DOUGLAS ARTHUR,

PETITIONER,

v.

STATE OF ALABAMA,

RESPONDENT.

On Petition for Writ of Certiorari
to the Alabama Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant Arthur's petition for writ of certiorari to review the claim that the application of a statute of limitation to his state postconviction petition is a violation of due process as set out in the Fourteenth Amendment of the United States Constitution?

2. Should this Court grant Arthur's petition for writ of certiorari to review the claim that a state's failure to provide postconviction counsel violates a capital defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution?

3. Should this Court grant Arthur's petition for writ of certiorari to review the claim that a state's failure to provide a death-row inmate with state-funded counsel or any form of legal assistance in connection with state postconviction proceedings constitutes a violation of the inmate's rights under the Eighth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDING

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DECISION(S) BELOW

The order of the Alabama Supreme Court, unanimously denying discretionary review of the decision of the Alabama Court of Criminal Appeals, can be found within the appendix to the Petition for Writ of Certiorari. Petitioner's App. at p. A16.[1] The opinion of the Alabama Court of Criminal Appeals, affirming the trial court's dismissal of Arthur's petition for post-conviction relief, is not yet reported but can be found at 2001 WL 429289 (Ala. Crim. App. Apr. 25, 2001).[2]

STATEMENT OF JURISDICTION

The Alabama Supreme Court entered its order denying discretionary review on November 2, 2001. Arthur filed his petition for writ of certiorari on January 31, 2002, and it was placed on the docket on February 5, 2002. This Court, pursuant to 28 U.S.C. § 1257(a), generally has jurisdiction over issues addressed by the highest court of a state. In this case, however, the Court does not have jurisdiction because the first question presented was not raised in the state courts below and the remaining questions presented were procedurally defaulted by independent and adequate state grounds.

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[1] References to Arthur's petition for writ of certiorari will be as follows: Petitioner's App. at p. __.

[2] The Alabama Court of Criminal Appeals' opinion can also be found within the appendix to the Petition for Writ of Certiorari. Petitioner's App. at pp. A8-A15.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The statement of constitutional provisions involved in this case, which is contained on pages one and two of the petition for a writ of certiorari, are quoted correctly. None of the constitutional provisions quoted, however, are implicated in this case.

In addition, this case involves the following provision from the Alabama Rules of Criminal Procedure:

> PERIOD OF LIMITATIONS. Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed ...within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, A.R.A.P. ....

Rule 32.2(c)

> APPOINTMENT OF COUNSEL. If the court does not summarily dismiss the petition, and if it appears that the petitioner is indigent or otherwise unable to obtain the assistance of counsel and desires the assistance of counsel, and it further appears that counsel is necessary to assert or protect the rights of the petitioner, the court shall appoint counsel.

Rule 32.7(c).

STATEMENT OF THE CASE

A. Prior Court Proceedings

On December 5, 1991, Thomas D. Arthur ("Arthur") was convicted for the 1982 capital murder of Troy Wicker.[3] (CR. 11, R. 1150)[4] After a sentence hearing wherein Arthur requested the death penalty, the jury recommended, by an eleven-to-one vote, that Arthur be sentenced to death. (CR. 12, R. 1237) On January 24, 1992, the trial court entered a sentencing order in which it followed the jury's recommendation and sentenced Arthur to death. (CR. 14-26, R. 1291-1300)

Arthur appealed to the Court of Criminal Appeals. On March 8, 1996, the Court of Criminal Appeals affirmed Arthur's conviction and death sentence. *Arthur v. State*, 711 So. 2d 1031 (Ala. Crim. App. 1996). On November 21, 1997, the Alabama Supreme Court affirmed the judgment of the Court of Criminal Appeals. *Ex parte Arthur*, 711 So. 2d 1097 (Ala. 1997). On April 7, 1998, the Alabama Court of Criminal Appeals, in compliance with Rule 41 of

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[3] Arthur was originally convicted and sentenced to death for the capital murder of Troy Wicker in 1982. The Alabama Supreme Court reversed Arthur's conviction and death sentence in 1985 "due to the improper admission of evidence of a prior murder." *Arthur v. State*, 2001 WL 429289, at *1 (Ala. Crim. App. Apr. 25, 2001). Arthur "was again tried, convicted, and sentenced to death, but the second conviction was" reversed by the Alabama Court of Criminal Appeals in 1990, "due to the absence of the constitutionally necessary predicate for the admission of the appellant's statement into evidence." *Id.*

[4] (CR. __) refers to pages of the clerk's record of Arthur's 1991 capital murder trial. (R. __) refers to pages in the transcript of Arthur's 1991 capital murder trial. (CR32. __) refers to pages of the clerk's record from Arthur's Rule 32 state postconviction proceedings.

the *Alabama Rules of Appellate Procedure*, issued a Certificate of Judgment. Arthur never filed a petition requesting certiorari review in the United States Supreme Court.

Arthur did not file a state postconviction petition before April 8, 2000 - the date the statute of limitation set forth in Rule 32.2(c) of the *Alabama Rules of Criminal Procedure* expired. Arthur additionally failed to file a petition in federal court under 28 U.S.C. §2254 before the federal statute of limitation, *see* 28 U.S.C. §2244(a)(1), expired on June 18, 1999. Because the time for Arthur to seek either state or federal postconviction review had long passed, the State of Alabama ("the State") filed a motion to set an execution date with the Alabama Supreme Court on September 8, 2000. An amended motion to set an execution date was filed on September 15, 2000, correcting a calculation error in the September 8 motion.

On January 25, 2001, four months after the State filed a motion to fix a date for execution, Arthur filed a Motion to File an Out of Time Petition and an accompanying Petition for Relief From Judgment, i.e., his state postconviction petition. (CR32. 60-187) On February 21, 2001, the State filed a motion to dismiss the Rule 32 petition as untimely. (CR32. 217-229) The trial court, on March 14, 2001, issued an order denying and dismissing Arthur's state postconviction petition as precluded by the statute of limitation set out in Rule 32.2(c), A.R.Cr.P. (CR32. 201-211)

The Alabama Supreme Court, on March 23, 2001, set Arthur's date of execution for April 27, 2001. On April 5, 2001, Arthur filed a notice of appeal of the trial court's order denying and dismissing his state postconviction petition to the Alabama Court of Criminal Appeals. (CR32. 54-57) On April 20, 2001, Arthur filed a petition for writ of habeas corpus, along with a motion to stay

execution, in the United States District Court for the Northern District of Alabama. Judge Edwin Nelson of the United States District Court issued a stay of execution on April 25, 2001. That same day, the Alabama Court of Criminal Appeals affirmed the denial and dismissal of Arthur's state postconviction petition. *Arthur v. State*, 2001 WL 429289 (Ala. Crim. App. Apr. 25, 2001). The Alabama Court of Criminal Appeals overruled Arthur's application for rehearing on July 27, 2001. Arthur then filed a petition for a writ of certiorari in the Alabama Supreme Court, which was denied on November 2, 2001.[5]

B. Statement of the Facts

The Alabama Court of Criminal Appeals' opinion on direct appeal contained the following summary of the facts of the capital offense:

> This appeals (sic) follows the appellant's third trial for the killing of Troy Wicker. The appellant was convicted of capital murder and sentenced to death by electrocution in each of the three trials. The Alabama Supreme Court reversed the appellant's first conviction, holding that details of the appellant's prior second degree murder conviction were improperly admitted at trial under the identity exception to the general

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[5] Within his Statement of the Case, Arthur makes numerous allegations for which there is no evidentiary support within the record on appeal. More specifically, there is no evidentiary support within the record to support allegations that Arthur (1) did not have a lawyer while his state postconviction statute of limitation was running, (2) did not have access to any legal assistance, (3) did not have access to an adequate law library, (4) was prevented from meeting with individuals who had expressed an interest in helping him, and, (5) did not receive notice that the two-year statute of limitation was running against him.

exclusionary rule. *Ex parte Arthur*, 472 So.2d 665 (Ala.1985). The appellant was again convicted of capital murder and was sentenced to death by electrocution. However, this court reversed his second conviction, holding that the admission into evidence a statement made by the appellant to a police officer two weeks after the appellant had asserted his right to remain silent constituted plain error because the appellant did not initiate the conversation and there was no evidence that he had been given access to an attorney following assertion of his right to remain silent. This court held that the statement probably had an unfair prejudicial impact on the jury. *Arthur v. State*, 575 So.2d 1165 (Ala.Cr.App.1990), *cert. denied*, 575 So.2d 1191 (1991).

Following this second reversal, the appellant was charged in a two-count indictment with the intentional murder of Troy Wicker by shooting him with a pistol, made capital because he had previously been convicted of murder in the second degree in 1977, *see* § 13A-5-40(a)(13), *Code of Alabama* 1975, and with capital murder for intentionally causing the death of Troy Wicker by shooting him with a pistol for pecuniary or other valuable consideration, *see* § 13A- 5-40(a)(7), *Code of Alabama* 1975. Before submitting the case to the jury at the guilt phase, the prosecutor elected to proceed only under the first count of the indictment. The jury found the appellant guilty of capital murder as charged in this first count of the indictment. The jury subsequently returned an advisory verdict of death by electrocution by a vote of 11 to 1. Following a separate sentencing hearing, the

trial court upheld the jury's advisory verdict and sentenced the appellant to death by electrocution.

This court set on the earlier appeal out a complete rendition of the evidence presented at the appellant's second trial. *Arthur v. State*, 575 So.2d at 1167-70. That evidence is substantially similar to that presented in the third trial, but there were some differences: changes in the testimony of State's witness Judy Wicker; the testimony by witness, Gene Moon, was offered on behalf of the appellant at the third trial rather than for the State as in the second trial; and certain evidence that was admitted at the second trial was not entered into evidence at the third trial. For this reason, the trial court's 'Findings of Fact From the Trial,' which briefly sets out the evidence presented at the third trial, is included:

Reference should be made to this court's earlier rendition of the facts found at *Arthur v. State*, 575 So.2d at 1167-70, for an overall picture of the evolution of this case. This court may properly take judicial notice of its own records, *Riddle v. State*, 669 So.2d 1014 (Ala.Cr.App.1994); *Ray v. State*, 646 So.2d 161, 161 n. 1 (Ala.Cr.App.1994).

'State's case:

'Thirteen witnesses testified for the state, the state's case being bottomed on the testimony of accomplice Judy Wicker, Wicker having been indicted and convicted by a jury verdict for the intentional murder of her husband, Troy Wicker.

'Wicker's conviction and life sentence were affirmed in May, 1983 at *Mary Jewel Wicker v. State*, 433 So.2d 1190. Wicker was in state

custody when she testified on Wednesday of the trial week.

'Proceeding Wicker's testimony:

. . .

'Talmadge Sterling, correctional officer at the Decatur Work Release Center, testified about defendant's residency at the center as did Pat Halliday, employed at the center, who testified about a discrepancy in the defendant's payroll records;

'Pat Yarbrough Green, who testified that she became acquainted with defendant at Cher's Lounge (Ms. Green was employed at Cher's Lounge in 'parole' status, having suffered several felony convictions); that defendant wanted to talk privately at the lounge; that in the kitchen he asked the witness, 'Can you get me some bullets? Has to be .22 caliber mini mag long rifles.' [sic]; that she enlisted the services of a third person to go across the street to buy the bullets; that the defendant gave her $10.00 for the bullets; that while waiting on the delivery of the bullets the defendant stated, 'Someone will be killed in Tennessee. Don't worry, it won't be traced to us.' [sic]; also, that defendant asked witness if she had access to 'jars' or knockout pills and asked if she knew where defendant could get some jars/pills; that she gave the .22 bullets to the defendant;

'Debra Lynn Phillips Tynes, manager of Cher's Lounge and defendant's paramour, states that on the day of the killing the defendant was late for a lunch date, that ultimately defendant and she went for a car ride across the Tennessee River Bridge; that defendant stopped the car and threw into the river a 'plain black garbage bag'

wrapped in a sheet, stating that 'I want to get rid of some old memories';

. . .

'Dr. Aquilar testified as to cause of death; that deceased was shot at close range through the closed right eye;

'James Otis Garrard, clerk of the circuit court of Marion County testified re [garding] Court Exhibit # 40, court documentation reflective of defendant's prior conviction for second [degree] murder;

'Judy Wicker, who at the time of her testimony in the latest trial resided at a work release center in Wetumpka, serving a life sentence as accomplice to her husband's murder, stated that she lived in Muscle Shoals in 1982 with her husband, their two sons, ages five and seven, and a daughter by a prior marriage; that Troy, her husband, worked on a barge as an engineer; that her marriage(s) to Troy had been marked by intermittent discord; that Troy and her sister, Teresa, did not get along; that Teresa's boyfriend was Theron McKinney; that she met Arthur when they were young and worked with him at Tidwell Homes; that she and Teresa discussed killing Troy in early 1981; that several conversations occurred between she and Teresa re[garding] killing Troy; that there was $90,000 worth of life insurance on Troy's life; that the defendant Arthur called her by phone and stated 'I'm hired to do a job--kill your husband'; that about one week after the phone call she and Arthur met at Arthur's father's house or at Reagan's Mobile Homes; that there were sexual encounters between she and Arthur; that she knew the day of February 1 that this was the day

her husband was to be killed; that the night preceding the killing she, her husband and Teresa had a drinking party at the Wicker home; that she dropped the children at school on February 1, met ... her sister, finally getting together with Teresa 'out by the airport'; that Teresa was driving a Riviera; that defendant was with her, 'made up' to look like a black man--face blackened, wearing an Afro wig and gloves; that Arthur got out of Teresa's car and into her car; that she smelled alcohol on his breath; that he had a pistol plus a garbage bag; that en route to the Wicker home she asked Arthur not to 'do it,' 'I'll give you money or whatever'; that Arthur stated 'The SOB deserves to die'; that she had left her husband in bed asleep; that upon entering the house defendant began destroying things. 'We went to the bedroom, I ran but I heard the shot. I ran to the utility room--'; further, that she ended up in the den, receiving a blow to the head 'battering my head badly, knocking out some teeth, upper lip cut into my nose. I didn't have an upper lip.' [sic]; that previously it had been established that she was to say that her and Troy's home was burglarized and she was assaulted by a black man; the first persons she saw on regaining consciousness were her sister and a detective; that after the killing she and Arthur continued to talk, go places together; that upon receipt of the insurance money witness paid Arthur $10,000, paid her sister, Teresa, $6,000 and Theron McKinney received some jewelry and a Trans Am automobile.

'Witness Wicker was thoroughly cross-examined by [defense counsel] as to the prior

> contradictory statements she made to the police and under oath at her trial, as to what she expected to gain from testifying.
>
> 'The defense case featured four witnesses:
>
> 'Officer Coan, a scene witness;
>
> 'Bruce Carrol, an inmate at St. Clair prison who stated he lost $6,500 to the defendant in a poker game;
>
> 'Ronald Spears, an inmate at West Jefferson prison who stated that Patsy Yarbrough Green had previously stated to him 'The cops told me to lie on Tommy re[garding] the .22 bullets';
>
> 'Gene Moon, residing in Cullman County Jail, stated that 'Inmate Murry gave me an envelope with $2,000 in it and I put it in Tommy's coat,' thus accounting for the defendant's possession of an inordinate amount of currency at the work release center.
>
> 'The defendant did not testify.'

Arthur v. State, 711 So. 2d 1031, 1042-1045 (Ala. Crim. App. 1996).

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD NOT BE GRANTED ON ARTHUR'S CONTENTION THAT APPLYING A STATUTE OF LIMITATION TO HIS STATE POSTCONVICTION PETITION VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Arthur requests certiorari based on his contention that the application of a statute of limitation to his state postconviction petition violates his right to due process under the Fourteenth Amendment to the United States

Constitution. Discussed below are five reasons why certiorari should not be granted to consider this issue.

A. Arthur's Contention That The Application Of A Postconviction Statute Of Limitation Violated His Right To Due Process Was Not Raised In The Court Below.

The specific issue of whether the application of a statute of limitation to Arthur's state postconviction petition violated the Fourteenth Amendment due process clause was never raised in the State courts below. This Court has repeatedly held that it will not consider questions raised for the first time in a certiorari petition. *Adams v. Robertson*, 520 U.S. 83, 85 (1997); *See also, e.g., Street v. New York*, 394 U.S. 576, 581-82 (1969); *Nelson v. County of Los Angeles*, 362 U.S. 1, 9 (1960); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); *S.R.A. v. Minnesota*, 327 U.S. 570 (1946)(Stone, J., concurring). This Court, therefore, should not grant certiorari to review Arthur's contention because he has raised the issue for the first time in his certiorari petition to this Court.

B. The Alabama Court of Criminal Appeals's Opinion Below Was Based On State Law.

The Alabama Court of Criminal Appeals' opinion below held that Arthur's postconviction petition was barred by the two-year statute of limitation. Petitioner's App. at p. A15. This judgment was based completely and solely on state law, i.e., Rule 32.2(c) of the *Alabama Rules of Criminal Procedure*. A state may apply its own procedural rules and may defeat a claim based on that independent state law. Because the Alabama Court of Criminal Appeals's holding was based on state law, this Court should deny Arthur's petition for writ of certiorari. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991)

("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.").

C. This Court Should Deny Certiorari Because The Factual Premise Of The Question Presented Is Not Supported By The Record.

The question presented in Arthur's petition is premised on his contention that he (1) "was not represented by counsel during the period of limitations,"[6] (2) "did not have access to any form of legal assistance,"[7] (3) "did not have access to adequate law library

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[6] In its order, however, the trial court stated the following regarding Arthur's assertion that he was not represented by counsel:

> Arthur also claims his petition was not timely filed because he was unable to obtain legal representation and he considered himself not competent to file a Rule 32 petition. This is no excuse from the procedural rule of Rule 32.2(c). Rule 32.7(c) allows the trial court, upon reviewing a petition, to determine the validity of the claims and, when appropriate, to appoint counsel to represent the petitioner and to liberally allow amendments to the pleadings. This Court routinely addresses pro se Rule 32 petitions in criminal cases. If Arthur had timely filed his petition, this Court, especially in the light of this case being one in which a death sentence has been imposed, would have given appropriate consideration to the petition. However, Arthur's tardiness precludes this Court from obtaining jurisdiction over any constitutional issues.

Petitioner's App. at pp. A3-A4.

[7] This allegation is refuted by the record from Arthur's 1991 capital murder conviction. *See infra.* at 26-28.

facilities,"[8] (4) "was prevented by the state from meeting with persons who might have been able to assist him," and, (5) "did not receive notice that the certificate of judgment had been entered[9] and ...did not know that the period of limitations had begun to run."[10] Even assuming Arthur raised this issue in the courts below, this Court should deny his petition for writ of certiorari because there is no evidentiary support in the record on appeal to support the factual allegations Arthur makes in support of his argument.

D. This Court Should Deny Certiorari Because The Issue Is Not Worthy Of Certiorari Review.

This Court should deny certiorari review because the question presented is not worthy of certiorari consideration. Certiorari is not a matter of right, but of

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[8] This allegation is refuted by the record from Arthur's 1991 capital murder conviction. *See infra.* at 23 n. 16.

[9] The trial court, in its order, stated the following regarding the certificate of judgment:

> Arthur contends he did not receive notice of the issuance of the certificate of judgment on direct appeal. The court notes, however, that Arthur acknowledges he was represented by counsel through the conclusion of his direct appeal in the Alabama Supreme Court. (Petition, p. 2, fn. 3) The certificate of judgment was issued pursuant to Rule 41, *Alabama Rules of Appellate Procedure*. Arthur's claimed ignorance because of lack of notice is without merit because his direct appeal counsel would have had notice that the certificate of judgment had been issued.

Petitioner's App. at p. A3.

[10] *See* Questions Presented for Review, question 1, as contained within the petition for writ of certiorari.

sound judicial discretion, and will be granted only where there are special and important reasons therefore. *See Fay v. Noia*, 372 U.S. 391, 436 (1963). Rule 10 of this Court's rules enumerates three reasons considered by this Court to be compelling reasons for exercising certiorari jurisdiction. Rule 10, *Rules of the Supreme Court of the United States*. Arthur has failed to show that any of these three grounds exist in his case as a basis for seeking certiorari jurisdiction.

This case involves interpretation of Alabama procedural rules and case law dealing with a very narrow field of law. This Court is well aware of the demands on its time to decide issues of far-reaching impact. This claim is simply of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

E. This Court Should Deny Certiorari Because This Issue Is Without Merit.

As stated above, Arthur contends that the application of a statute of limitation to his state postconviction petition violates his due process rights under the Fourteenth Amendment of the United States Constitution because it denied him access to Alabama's postconviction procedure. This contention is without merit.

This Court has established that "States have no obligation to provide" postconviction review, but when they do, they must act within the "dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Pennsylvania v. Finley*, 481 U.S. 551, 557-558 (1987). Contrary to his contention, Arthur did have access to Alabama's postconviction procedures, but he simply did not take advantage of his access before the statute of limitations expired. This Court plainly

established in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), the following:

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees. And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. What the Fourteenth Amendment does require, however, 'is an *opportunity* ... granted at a meaningful time and in a meaningful manner,' 'for [a] hearing appropriate to the nature of the case... ."

(emphasis in original) (internal citations omitted) As such, the State may establish reasonable procedural rules, such as a statute of limitation, which terminate claims without violating the dictates of the Fourteenth Amendment. All that is required is that the petitioner be given an *opportunity* to pursue the claim.

In Alabama, a state postconviction petitioner has two years to file any claims based on constitutional issues challenging his conviction or sentence. *See* Rules 32.1(a) and 32.2(c), A.R.Cr.P. This two-year statute of limitation does not apply, however, to claims of innocence that are based on newly discovered evidence. Rules 32.1(e) and 32.2(c), A.R.Cr.P. If, for example, the petitioner discovered new evidence establishing his innocence after his two-year statute of limitations period expired, he would be afforded six months to pursue postconviction relief. Furthermore, there is no statute of limitation for filing a postconviction petition based on claims that (1) "[t]he court was without jurisdiction to render judgment or to impose sentence," (2) "[t]he sentence imposed

exceeds the maximum authorized by law or is otherwise not authorized by law," or, (3) "Petitioner is being held in custody after petitioner's sentence has expired." Rule 32.1(b) through (d), A.R.Cr.P. Thus, Alabama's statute of limitation for filing a state postconviction petition is a reasonable procedural rule because it provides the petitioner ample time[11] to file his petition while not foreclosing any opportunities to present claims of innocence based on newly discovered evidence.

Arthur had an opportunity[12] to file a state postconviction petition and gain access to Alabama's postconviction procedure. In accordance with *Logan*, an opportunity is all that is required under the Fourteenth Amendment. Thus, applying the statute of limitations, a reasonable procedural rule, to Arthur's postconviction petition did not violate the Fourteenth Amendment's Due

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[11] Alabama's statute of limitations period is twice the amount of time as the statute of limitation established for filing federal habeas petitions. *See* 28 U.S.C. §2244(a)(1).

[12] While Arthur contends that he missed the two-year statute of limitation because he did not have legal representation, this contention is without merit because he could have obtained appointed counsel pursuant to Rule 32.7(c), A.R.Cr.P., which provides for the appointment of counsel after a state postconviction petition has been filed. Any contention that Arthur could not have filed such a petition is equally without merit as Rule 32, A.R.Cr.P., contains a form for preparing a postconviction petition wherein the petitioner simply fills in the blanks. Furthermore, while Arthur contends that a pro se postconviction petition has to survive summary dismissal before the petitioner may be appointed counsel, he has not identified one single state pro se postconviction petition filed by a death row inmate that was summarily dismissed without legal counsel first being appointed and being afforded ample opportunity to amend the petition as needed.

Process Clause. Arthur's contention to the contrary is without merit. This Court should, therefore, deny certiorari review of this issue.

II. CERTIORARI SHOULD NOT BE GRANTED ON ARTHUR'S CONTENTION THAT A STATE'S FAILURE TO PROVIDE POSTCONVICTION COUNSEL VIOLATES A CAPITAL DEFENDANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Arthur requests certiorari based on his contention that a state's failure to provide postconviction counsel violates a capital defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution when his postconviction petition is his first opportunity to raise claims of ineffective assistance of counsel. Discussed below are four reasons why certiorari should not be granted to consider this issue.

A. The Alabama Court of Criminal Appeals's Opinion Below Was Based On State Law.

While Arthur raised this issue in the Alabama Court of Criminal Appeals, the State court below did not address it because the court held that Arthur's postconviction petition was barred by the two-year statute of limitation, an adequate and independent state ground. Petitioner's App. at p. A15. A state may apply its own procedural rules and may defeat a claim based on that independent state law. Because the Alabama Court of Criminal Appeals's holding was based on state law, this Court should deny Arthur's petition for writ of certiorari. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests

on a state law ground that is independent of the federal question and adequate to support the judgment.").

B. This Court Should Deny Certiorari Because The Factual Premise Of The Question Presented Is Not Supported By The Record.

The question presented in Arthur's petition is premised on his contention that he was not represented by counsel before the statute of limitations period for filing his postconviction petition expired. This Court should deny certiorari review based on this issue because there is no evidentiary support in the record on appeal to support the factual allegations Arthur makes in support of his argument.

C. This Court Should Deny Certiorari Because The Issue Is Not Worthy Of Certiorari Review.

This Court should deny certiorari review because Arthur's contention is not worthy of certiorari consideration. Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. *See Fay v. Noia*, 372 U.S. 391, 436 (1963). Rule 10 of this Court's rules enumerates three reasons considered by this Court to be compelling reasons for exercising certiorari jurisdiction. Rule 10, *Rules of the Supreme Court of the United States*. Arthur has failed to show that any of these three grounds exist in his case as a basis for seeking certiorari jurisdiction.[13]

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[13] Arthur contends that there is a conflict between the highest courts in Mississippi and Georgia on the issue of whether a state postconviction petitioner has a constitutional right to counsel. Petitioner's App. at p. 19. A careful review of the Mississippi and Georgia opinions in *Jackson v. Mississippi*, 732 So. 2d 187 (Miss.

This case involves interpretation of Alabama procedural rules and case law dealing with a very narrow field of law. This Court is well aware of the demands on its time to decide issues of far-reaching impact. This issue is simply of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

D. This Court Should Deny Certiorari Because This Issue Is Without Merit.

As stated above, Arthur contends that he was entitled to postconviction counsel under the Sixth and Fourteenth Amendments to the United States Constitution because his state postconviction petition was his first opportunity

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1999), and *Gibson v. Turpin*, 513 S.E. 2d 186 (Ga. 1999), indicates that there is no conflict. The *Gibson* opinion simply recognizes that legal representation at the state postconviction stage is not constitutionally compelled. 513 S.E. 2d at 192. The Mississippi Supreme Court in *Jackson* simply held that a state postconviction petitioner is entitled to legal representation because its state postconviction procedure, the Uniform Post-Conviction Collateral Relief Act (UPCCRA), has "become part of the death penalty appeal process at the state level." *Jackson*, 732 So. 2d at 191. The *Jackson* opinion is, therefore, merely an opinion based on Mississippi law as applied to facts unique to Mississippi, not Georgia or any other state. In other words, the Mississippi Supreme Court simply went beyond what was constitutionally compelled in interpreting the law in Mississippi. The *Gibson* opinion also notes that if a postconviction petitioner was constitutionally entitled to legal representation, that would result in collateral petitions being filed to review the effectiveness of collateral counsel. 513 S.E. 2d at 191.

to raise claims of ineffective assistance of counsel. This contention is simply without merit.[14]

This Court firmly established in *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) that a petitioner has no federal constitutional right to counsel in a state postconviction proceeding. Two years later, in 1989, this Court, in a plurality opinion,[15] held that *Finley* applied to postconviction petitioners who were sentenced to death. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). Thus, Arthur's assertion that he was constitutionally entitled to postconviction counsel is simply without merit.

In an attempt to get around the Court's opinions in *Finley* and *Giarratano*, Arthur contends that this Court created an exception or loophole in *Coleman v. Thompson*, 501 U.S. 722, 755-756 (1991), which would entitle a petitioner to counsel when the postconviction petition is the petitioner's first opportunity to raise a claim such as ineffective assistance of counsel. As the Fourth Circuit Court of Appeals noted, "each of the courts of appeals that has been asked to adopt the exception alluded to in *Coleman* has ... rejected that invitation." *Mackall v. Angelone*, 131 F.3d 442, 449 n.13 (4th Cir. 1997). In

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[14] Arthur's contention fails to recognize that he could have obtained appointed legal representation pursuant to Rule 32.7(c), A.R.Cr.P. *See supra* at 17 n.12.

[15] Arthur asserts that "a majority of the Court has failed to reach agreement as to Finley's actual application to capital cases." Petitioner's App. at p. 20 n.13 This Court, however, in *Coleman v. Thompson*, 501 U.S. 722, 755 (1991), recognized that its holdings in both *Finley* and *Giarratano* established that there is no right to counsel in state postconviction proceedings. Thus, a majority of this Court has reached an agreement as to *Finley's* application to capital cases.

addition, the Fourth Circuit stated that "[t]he *Coleman* Court did not adopt an exception to *Finley*; it merely rejected Colemen's argument that the Court should create such an exception ...." *Mackall*, 131 F.3d at 449. Arthur's contention that his case falls within an exception created by *Coleman* is, therefore, without merit because no such exception exists. As such, this Court should deny Arthur's petition for writ of certiorari on this issue.

III. CERTIORARI SHOULD NOT BE GRANTED ON ARTHUR'S CONTENTION THAT ALABAMA'S FAILURE TO PROVIDE POSTCONVICTION COUNSEL OR OTHER LEGAL ASSISTANCE VIOLATES HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Arthur requests certiorari based on his contention that Alabama's failure to provide postconviction counsel or other legal assistance violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution. Specifically, Arthur contends that he was denied access to the courts because he was not provided legal representation or other legal assistance. Petitioner's App. at pp. 24-27. In addition, Arthur asserts that the evolving standards of decency require a state to provide postconviction counsel or some other legal assistance. Petitioner's App. at pp. 27-28. Discussed below are four reasons why certiorari should not be granted to consider this issue.

A. The Alabama Court of Criminal Appeals's Opinion Below Was Based On State Law.

While Arthur raised this issue in the Alabama Court of Criminal Appeals, the State court below did not address it because the court held that Arthur's postconviction petition was barred by the two-year statute

of limitation, an adequate and independent state ground. Petitioner's App. p. A15. A state may apply its own procedural rules and may defeat a claim based on that independent state law. Because the Alabama Court of Criminal Appeals's holding was based on state law, this Court should deny Arthur's petition for writ of certiorari. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.").

B. This Court Should Deny Certiorari Because The Factual Premise Of The Question Presented Is Not Supported By The Record.

The question presented in Arthur's petition is premised on his allegation that he did not have legal representation, legal assistance, or an adequate law library[16] to prepare his state postconviction petition. This Court should deny certiorari review based on this issue because there is no evidentiary support in the record on appeal to support the factual allegations Arthur makes in support of his argument.

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[16] While Arthur alleges that the law library he had access to was inadequate, this allegation is refuted by his statements to the trial court as recorded in the record on appeal. For example, in a letter, dated January 13, 1992, to the trial judge, Arthur requests that the trial judge sentence him to death so he can have better resources to attack his capital murder conviction. (CR. 399-400) To support this request, Arthur asserts that the law library he would have access to on death row is better than the general population law library. (CR. 400) Arthur never raised any concerns regarding the adequacy of the law library.

C. This Court Should Deny Certiorari Because The Issue Is Not Worthy Of Certiorari Review.

This Court should deny certiorari review because this issue is not worthy of certiorari consideration. Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. *See Fay v. Noia*, 372 U.S. 391, 436 (1963). Rule 10 of this Court's rules enumerates three reasons considered by this Court to be compelling reasons for exercising certiorari jurisdiction. Rule 10, *Rules of the Supreme Court of the United States*. Arthur has failed to show that any of these three grounds exist in his case as a basis for seeking certiorari jurisdiction.

This case involves interpretation of Alabama procedural rules and case law dealing with a very narrow field of law. This Court is well aware of the demands on its time to decide issues of far-reaching impact. This issue is simply of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

D. This Court Should Deny Certiorari Because This Claim Is Without Merit.

As stated above, Arthur contends that he was denied access to the courts because he allegedly was not provided legal representation or legal assistance. Petitioner's App. at pp. 24-27. Arthur further contends that evolving standards of decency require states to provide postconviction counsel or, at least, legal assistance.

Petitioner's App. at pp. 27-28. Arthur's contentions are without merit. [17]

This Court, in *Murray v. Giarratano*, 492 U.S. 1 (1989), was asked to decide, as in this case, whether (1) the right of access to the courts entitled a death row inmate to legal representation, and, (2) under the Eighth Amendment, the evolving standards of decency required the appointment of counsel to death row inmates. In *Giarratano*, this Court, in a plurality decision, held that a death row inmate is not entitled to postconviction counsel under the Eighth Amendment or the due process clause. *Id.* at 10-12. Thus, Arthur's contentions that his right of access to the courts and the evolving standards of decency entitle him to state postconviction representation are without merit.

Remarkably, Arthur does not even address the *Giarratano* opinion in the main body of his argument. Instead, Arthur attempts to cloud the issue by asserting, in a footnote, that because the *Giarratano* opinion was not a majority opinion, the decision is limited by Justice Kennedy's concurring opinion. Petitioner's App. at p. 26 n.15. This argument is without merit because this Court, in subsequent opinions, has recognized that the holding from the *Giarratano* opinion is that a death row inmate has no constitutional right to counsel in a state postconviction proceeding. *See Smith v. Robbins*, 528 U.S. 259, 275 (2000); *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 281 (1998); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

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[17] Arthur's contentions also fail to properly recognize that he could have obtained legal representation pursuant to Rule 32.7(c), A.R.Cr.P. *See supra* at 17 n.12.

This Court, in *Lewis v. Casey*, 518 U.S. 343, 351 (1996), established that the right of access to the courts does not create a "freestanding right to a law library or legal assistance." The *Casey* opinion, however, stated that "[t]he tools [the right of access to the courts] requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Id.* at 356.

While Arthur asserts that his right of access to the courts was denied because he did not have the tools necessary to collaterally attack his capital murder conviction and death sentence, the record on appeal from Arthur's 1991 capital murder conviction refutes these assertions. At the sentencing hearing, based on his experience of nine years on death row, Arthur set out[18] the advantages he would have on Alabama's death row compared to being sentenced to life without parole. (R. 1257-1283) A review of the record indicates the following:

> But, I am asking you, with as much emphasis as I can, to please give me the death penalty. I don't want to die, hell, I'm not crazy, I'm not nuts. But, giving me life and no parole will destroy my access to getting this thing back to court.
>
> For instance, just for example, law library in population, you have got seven or eight hundred guys going to that law library. It takes thirty days, forty-five days to get a book. *I can walk*

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[18] Arthur served as co-counsel at his 1991 capital murder trial, and took an active part in cross-examining witnesses, formulating objections, and making arguments to the trial court. *See Ex parte Arthur*, 711 So. 2d 1097, 1098 (1997).

around the corner from where I am on Death Row and get that book in thirty seconds. Of course, I can't carry it out of there but I can get what I want out of it, pass the information on to the attorneys working on my appeal.

. . .

Any way, I am not exaggerating or haven't been when I said Death Row is my home. I have been there nine years in the same cell, nine years. I know what I am doing there. *I have got a network of over seven or eight legal organizations, like Allen Durcowitz has an office that I can call and if something happens in Idaho on appeal or a death penalty motion of some sort, his office gets a computer printout of that thing within days and I have access to that and I can pass it on to my attorneys that are helping with the appeal.*

And I don't have that, I don't have access to things like that in a population situation.

. . .

But I have an eight by five cell, actually six by two and a half, about the size of your closet probably at home, maybe a little smaller, but I am comfortable in there, I know where everything is. I can't have what I have got in that cell in population, so that cuts another finger off of my hand to fight with.

The phone access, I can get the phone two days in a row every other two days, unlimited. I can call these people to help me with this preparation for the appeal. Can't do that in population, don't have that kind of access to the phone at all.

(R. 1259-1260, 1265-1266) (emphasis added)

In a letter to the trial judge, dated June 5, 1991, Arthur requested that he be allowed to remain on death row at Holman prison as long as possible before his third capital murder trial. (CR. 39-42) One basis for this request is Arthur's access to a "death row law library." (CR. 40) Arthur also argued that "anytime [he is] transferred to a county jail it automatically cuts [his] almost daily contact with various legal research groups at several different locations that are constantly sending [him] information on new motions and other very critical information concerning capital case rulings in other states that apply directly to [his] capital case."[19] (CR. 41)

As the record from Arthur's 1991 capital murder conviction clearly indicates, Arthur was extremely comfortable with the tools provided him on death row for attacking his capital murder conviction and death sentence. In fact, Arthur fought strenuously for the opportunity to continue taking advantage of his access to (1) a law library, (2) phone access, and, (3) numerous death penalty legal research organizations, with whom he had extensive contact, that provided constant assistance to him. Arthur's petition for writ of certiorari does not allege that any of these advantages Arthur identified on the record at his capital murder trial have been taken from him, nor does he allege that he was being untruthful

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[19] Arthur made similar arguments to the trial court in a pretrial motion requesting that he remain on Alabama's death row as long as possible before his trial. (CR. 156-158) In this motion, Arthur stated that he "has relative easy access to phone on Holman death row which gives him quick access to any of the legal organizations that correspond with him so any urgent matters resulting from mailed material can be answered same day as material received." (CR. 158)

when he identified these advantages to the trial court. Based on Arthur's own letters, motions, and arguments in the record, Arthur was not denied his right of access to the courts as he was provided the tools necessary to attack his conviction and death sentence.[20] Arthur's contentions to the contrary are without merit. This Court should, therefore, deny certiorari review of this issue.

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[20] In addition, the *Casey* opinion recognizes that, in order for an inmate to have a meritorious claim that his right of access to the courts has been violated, the inmate must show actual injury. *Casey*, 518 U.S. at 351-352. In an attempt to assert actual injury, Arthur contends that he "faces a presumption that his claims should not be heard in federal court because they have been procedurally defaulted in state court." Petitioner's App. at p. 27. This contention is without merit because, even if the State courts decided to hear his state postconviction claims, Arthur's federal habeas petition, as noted, is still time-barred by the AEDPA statute of limitation. *See supra* at 4.

CONCLUSION

Based upon the preceding legal authority and argument, this Court should deny Arthur's petition for writ of certiorari.

Respectfully submitted,

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